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## The GSH 60-Second Memo

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### Federal Court Holds that Company May be Held Liable for Retaliation against Supplier

By Emery K. Harlan, Esq.

Last month, a federal district court held that a company can be held liable for retaliating against an independent service contractor who complained about the company's alleged racially-motivated treatment of the contractor's employee. According to this decision, *S.K. Services v. FedEx Ground Package System, Inc.*, 2009 WL 2146211 (E.D.Tenn., July 14, 2009), a supplier or other business performing services for a company pursuant to a contract engages in protected activity under 42 U.S.C. § 1981 when it makes a complaint on behalf of one of its employees based on that employee's protected class status.

In 2002, the shipping giant, FedEx Ground Package System, Inc., contracted with S.K. Services for janitorial services at a facility it owned in Tennessee. They operated under a written agreement that was verbally renewed on several occasions, until

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they reached a new written agreement in June 2007.

In December, FedEx conducted an investigation regarding stolen payroll checks and concluded that an employee of S.K. was responsible. The proprietor of S.K. conducted his own investigation, which included speaking with his employee and others, and he came to the opposite conclusion. Nevertheless, in January 2008, FedEx insisted that this employee, who was black, no longer be allowed on FedEx's premises. Because S.K. had no other work for him, it terminated his employment. S.K. complained to FedEx that it believed the decision to bar the employee was due to racial animosity. Thereafter, in May 2008, FedEx decided not to renew the contract with S.K.

S.K. filed suit against FedEx, alleging a variety of state law claims, but also retaliation in violation of 42 U.S.C. § 1981. Section 1981 gives all persons the same right to make and enforce contracts "as is enjoyed by white citizens." A 1991 amendment to the law clarifies that the term "make and enforce contracts" includes "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."

The court framed the issue in this case as whether § 1981 applies to "retaliation claims stemming not from an employer-employee relationship, but instead from a non-employment contractual relationship." FedEx argued that this was not the issue, because it had no contractual relationship with S.K. after the 2007 contract expired. But the court made short work of this argument. The court noted that, if the existence of a contract was essential, the purpose of the law would be undermined. A refusal to enter a contract because of race is one of the enumerated acts that the law is intended to prohibit.

The court applied a four-part test on the retaliation claim. To establish retaliation, a plaintiff must show that it: (1) engaged in an activity protected under anti-discrimination statutes; (2) the defendant was aware of plaintiff's participation in the protected activity; (3) the defendant took adverse action against plaintiff based upon plaintiff's activity; and (4) a causal connection existed between plaintiff's protected activity and the adverse action taken by the defendant.

To engage in a protected activity, a plaintiff must demonstrate that his opposition to a discriminatory practice was reasonable and based on a good-faith belief that the defendant acted in violation of the civil rights laws. Likening the situation to those where an employee is fired for protesting the alleged discrimination of a protected class co-worker, the court concluded that S.K. had engaged in a protected activity, too.

The court then proceeded to hold that it was for a jury to decide whether FedEx's stated reasons for not renewing its contract with S.K. were legitimate, or instead, the non-renewal was in fact retaliation for S.K.'s complaints about the alleged discriminatory treatment of its employee.

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An appeal of this decision seems likely.

Nevertheless, in light of this recent court ruling, businesses may want to take measures to ensure that its employees and managers treat all suppliers with whom they come into contact in accordance with the company's own anti-discrimination policies. Additionally, complaints by vendors as to the treatment of its employees due to a protected class status should be addressed and handled in a manner consistent with the company's internal investigation practices and procedures. As always, companies should document any such investigations, along with its conclusions. Finally, when making a decision to terminate or not renew a supplier contract, it is important for companies to make an assessment of any risk of possible legal exposure under § 1981.

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